

## CALIFORNIA COASTAL COMMISSION

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January 17, 2001

received  
1/29/01

Matt Brookhart  
National Marine Sanctuary Program  
N/ORM6, 11<sup>th</sup> Floor  
1305 East West Highway  
Silver Spring, MD 20910

Re: **Comments on draft report "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries"**

Dear Mr. Brookhart:

Thank you for the opportunity to comment on the draft NOAA report "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries." The California Coastal Commission is particularly interested in issues related to fiber optic cable projects in national marine sanctuaries. The Coastal Commission has the statutory authority to permit projects consistent with the Chapter 3 policies of the California Coastal Act of 1976, as amended, in state waters, and has federal consistency authority over projects in federal waters pursuant to the Coastal Zone Management Act. Projects are also permitted by local jurisdictions consistent with their respective Local Coastal Programs in areas of delegated permit jurisdiction.

Since 1987, the California Coastal Commission ("CCC" or "Coastal Commission") has permitted six offshore fiber optic cable ("FOC") projects. Four of these projects, consisting of six trans-Pacific and three north-south aligning cables, were permitted in the last year, illustrating the recent expansion of FOC development in the coastal zone. The comments provided below are based on the Commission staff's permitting and regulatory experiences and the actions taken by the CCC to date with respect to these projects.

- The premise of the analysis, which is stated in the report as "installation of fiber optic cables is believed to have relatively limited impacts," is inaccurate for the following stated reasons. In addition to those impacts described in the report, other potential environmental impacts may include: 1) whale entanglement in cables (cables are not always buried deeply enough or become exposed); 2) "strumming" of cables that are exposed or are laid across submarine canyons, which may harm marine organisms and benthic habitat; 3) release of drilling fluids (e.g., bentonite) due to "frac-outs," which can impact marine organisms and water quality, during directional drilling operations; and 4) potential marine mammal injury due to cable installation activities.<sup>1</sup>
- It is inaccurate to assume that all cables can be successfully buried. Seafloor topography (e.g., canyons) and rocky substrates offshore California can preclude cable burial. No fiber optic cable

<sup>1</sup> On January 9th, 2001, an injured gray whale calf was encountered while monitoring fiber optic cable laying operations at Morro Bay, California. As of this date, the information that has been gathered is inconclusive as to exactly how the injury occurred. A more complete analysis of causes of the incident is being conducted.

projects that the Commission has approved have been 100% buriable. In addition, national marine sanctuaries, for example Monterey Bay, have been designated as such precisely because of their unusual offshore geology. Monterey Bay National Marine Sanctuary contains an unusually large amount of hard bottom habitat and submarine canyons that make cable burial very difficult if not impossible.<sup>2</sup>

- The report states that "if the economic benefit of installing a fiber optic cable across a marine sanctuary exceeds the costs, including environmental loss, the cable should be installed." However, as described above, the report does not adequately identify all potential environmental impacts caused by FOC projects. In addition, the report does not employ existing economic methods to quantify the amenity and environmental costs of FOC projects, including, as peer reviewer Schmalensee notes, "substantial 'non-market amenity' cost[s] associated with ... knowing that a portion of the sanctuary is no longer pristine."<sup>3</sup>
- The report does not discuss the issue of fiber optic cable removal and abandonment during the review of fiber optic cable projects. Analysis of a cable installation project's environmental impacts should include the impacts of removal after 25 years (the standard project life used in the report), and permits should include conditions requiring removal as well as significant financial penalties if cables are not removed satisfactorily upon expiration of their permit.
- On page 11, the report states that "the ultimate responsibility for minimizing injury to sanctuary resources lies within the Army Corps of Engineers ["ACOE"] permitting process and the review of that permit by sanctuary authorities." Neither the report nor this statement acknowledge the federal consistency authority delegated to states with approved coastal management plans consistent with the Coastal Zone Management Act. Since the California Coastal Commission retains federal consistency review of all projects permitted or performed by ACOE under this authority, including projects in federal waters, we believe that this authority should be described in the report.<sup>4</sup>
- It is worthwhile to note that while the California State Lands Commission is the owner and lessor of submerged lands in state waters (and therefore the primary state agency to assess fees for use of such lands), the Coastal Commission has also required applicants to compensate for all project-related impacts to hard bottom habitat through payment of a compensatory hard bottom mitigation fee. The fee is currently \$27.31 per square foot<sup>5</sup>, and the proceeds from the fees are used to construct new artificial reefs or to augment existing artificial reefs in State waters in the vicinity of the project area.<sup>6</sup> NOAA may wish to consider assessing similar mitigation fees separate from and in addition to any general fee for right of way through a national marine sanctuary, to compensate for a cable project that crosses hard bottom habitat.

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<sup>2</sup> See "Final Environmental Impact Report for Global West Fiber Optic Cable Project," SAIC, March 2000.

<sup>3</sup> The report's analysis of economic costs (including amenity and environmental costs) should also factor in the environmental concerns described in the first two bulleted comments in this comment letter.

<sup>4</sup> For example, the CCC recently permitted the Global West Network project in both state and federal waters in central and southern California (E-00-008/CC-110-00).

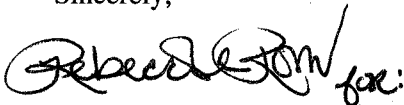
<sup>5</sup> The basis for this fee can be found in the CCC's recent fiber optic cable project staff reports, including E-00-008/CC-110-00.

<sup>6</sup> Fees are paid to a non-profit organization and the construction of new artificial reefs or augmentation of existing reefs is carried out pursuant to a Memorandum of Agreement by and between the Coastal Commission, the California Department of Fish and Game and the relevant non-profit organization.

- Coastal Commission staff agree with both peer reviewers with regard to the necessity of frequent updates to any single fee amount that is determined by NOAA for installation of fiber optic cables in marine sanctuaries, due to the likelihood of rapid change in both the fiber optic cable industry and market prices for cable rights-of-way.
- Coastal Commission staff agree with peer reviewer Schmalensee's comment that the report's recommendation of \$120,000 per mile for fiber optic cable installation in marine sanctuaries is "more likely to be too low than too high." Among the reasons why this amount may be too low is that the report does not address the intrinsically higher value of the resources in national marine sanctuaries relative to other marine areas. It also does not address issues related to the different geographical locations of various national marine sanctuaries. California, in particular, is experiencing a high demand for new transoceanic cable routes and there is a scarcity of such routes. As Schmalensee notes, \$350,000 per mile was recently negotiated for a cable right of way across San Francisco's Golden Gate bridge in a project with few if any environmental impacts.<sup>7</sup> We disagree that the analysis should exclude the California State Lands Commission data point of \$280,000 per mile right-of-way fee from the overall set of previous right-of-way transactions cited in the report simply because "it would raise the average significantly." Lastly, a higher fee would serve as a significant economic incentive to find alternative cable routes that do not cross national marine sanctuaries.
- Coastal Commission staff recommend that any cable permit or right of way fees paid to NOAA be earmarked for the particular marine sanctuary that the cable crosses, so that such funds can be used to mitigate potential impacts and restore and enhance marine resources in that sanctuary.

Thank you again for the opportunity to provide comments on "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries." We look forward to working with you on this. If you have any questions, please contact Marina Cazorla at (415) 904-6093 or Dan Chia at (415) 904-5248.

Sincerely,



Jaime C Kooser, Ph.D.  
Deputy Director  
Energy, Ocean Resources and Water Quality



Marina Cazorla  
Environmental Specialist  
Energy and Ocean Resources Unit

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<sup>7</sup> Schmalensee, Richard, "Review of the September 2000 draft of "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries," November 2000.

**Subject: Fair Market Value**

**Date: Thu, 11 Jan 2001 20:37:30 EST**

**From: <IAJfish@aol.com>**

**To: [submarine.cables@noaa.gov](mailto:submarine.cables@noaa.gov)**

**CC: [akondelis@nrccorp.com](mailto:akondelis@nrccorp.com), [dmeggitt@earthlink.net](mailto:dmeggitt@earthlink.net), [kdunlop@nrccorp.com](mailto:kdunlop@nrccorp.com), [larmbruster@nrccorp.com](mailto:larmbruster@nrccorp.com), [larmbruster@uswest.net](mailto:larmbruster@uswest.net), [sparks@nrccorp.com](mailto:sparks@nrccorp.com), [tholman@nrccorp.com](mailto:tholman@nrccorp.com)**

Dear ONMS:

The following are my comments on the Fair Market Value of submarine cables through National Marine Sanctuaries.

FILE COPY

(1) Would these easement fees be applied over all miles of a cable route through a sanctuary including those within three nautical miles (state waters) and outside of 12 nautical miles (federal EEZ waters outside U.S. territorial waters)?

Cable companies routinely pay aquatic land lease fees or easement fees through state waters within three nautical miles of the U.S. coast. If the ONMS intends to also charge an easement through state waters, cable companies will be charged twice for the same cable route. ONMS should consider either not charging for easements through state waters where the state imposes a separate easement fee or crediting the cable company with the state easement payment against the federal easement fee. Has ONMS obtained a legal opinion about where they have jurisdictional authority to charge a federal easement fees for sanctuary crossing outside the 12 nautical mile U.S. territorial limit? ONMS should review the pertinent international cable agreements, treaty and Law of the Sea acts that pertain to access fees placed on international telecommunication companies seeking access to U.S. waters for cable landings. If ONMS is successful in charging easement fees for sanctuary waters outside the 12 nautical mile territorial water boundary, it may result in other nations imposing similar fees for cable access within their 200 nm EEZ's. The combined impact of such fees might very well prove to make such projects unfinancable, particularly if the easement fees were all due at the time of permitting.

If sanctuary easement fees are imposed they should be prorated over the period of the easement and paid on an annual basis instead of a one time upfront charge.

In many cases, easements on land are paid over the life of the easement period to the land owner. This allows part of the cost of the cable installation to be paid by revenue from the cable operation and lowers the upfront cost the system and make financing the project much more feasible. Railroads, local and state transportation departs and private individuals all typically allow some sort of an annual easement fee payment process. With declining rates for broadband, financing the upfront cost of system capital equipment and installation is rapidly becoming the largest hurdle to submarine cable projects. ONMS should consider an annual easement fee payment plan over the life of easement period.

(3) Many states are looking at encouraging the establishment of submarine cable corridors where multiple cables can be landed and environmental and access impacts can be confined to a relatively narrow path along the ocean floor. ONMS should consider reducing individual easement fees on a per cable basis for cables located in approved corridors.

To some extent, cable corridors cable companies have been hesitant to agree to exclusive use of cable corridors due to their desire for redundancy in services offered by locating geographical diverse shore landings in a given area that reduces the likelihood of multiple cable distributions due to a seismic or other event. Closely aligned cables are also susceptible to man-caused events such as an anchor drag or other activity that can disrupt service along more than one cable at a time. However, if fees associated with an ONMS easement for a multiple cable corridor through a sanctuary were reduced or if only a single fee for the corridor was charged which could be shared by more than one cable if a corridor, cable companies may be more likely to agree to use corridors. Using corridors would simplify the permitting process since the entire corridor could be studied for the ACOE's permitting process and then each cable company's project permitted separately. Cable projects would be concentrated to a narrow area of the shelf where monitoring of impacts could be more readily studied. If there are short or long term impacts of submarine cable projects they should be more readily identified in areas where cables are concentrated.

Thank you for the opportunity to comment on your proposal.

eers, Jeff June

Jeffrey A. June  
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SEATTLE, WASHINGTON 98119-1650, U.S.A.  
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WWW: <http://www.nrccorp.com>

FIBER COPY

**Subject: Fair Market Value Analysis****Date: Wed, 07 Feb 2001 15:09:59 -0500****From: Amy Mathews-Amos <amy@mcbi.org>****To: submarine.cables@noaa.gov****CC: Barbara Jeanne Polo <bjpolo@americanococeans.org>, Elliott Norse <elliott@mcbi.org>, Beth Kantrowitz <beth@mcbi.org>**

Matt Brookhart, Conservation Policy and Planning Branch,  
Office of National Marine Sanctuaries,  
National Oceanic and Atmospheric Administration  
1305 East-West Highway, 11th Floor,  
Silver Spring, MD 20910,

Dear Mr. Brookhart:

Thank you for the opportunity to comment on Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries (Federal Register Vol. 66 No. 4 p 1092, January 5, 2001). Marine Conservation Biology Institute (MCBI) and American Oceans Campaign (AOC) are pleased to see that the National Oceanic and Atmospheric Administration (NOAA) has given this important issue such a thorough, thoughtful, and informative review. National Marine Sanctuaries are recognized as special places, warranting special protections. As your review notes, such places provide both tangible (e.g. ecological services, sustainable wildlife populations) and intangible (e.g. aesthetics, knowledge of existence) benefits to the American people that are difficult to quantify. However, difficulty in quantifying benefits does not mean that these areas have little or no value. Such erroneous thinking has contributed to environmental degradation of public resources in the past: The federal government has a history of not recovering adequate compensation for natural resources, including access to timber in National Forests and fees for filming in National Parks. There is now increasing bipartisan recognition that failure to assess fair market value for public resources not only short-changes the American taxpayer, it contributes to economically inefficient resource use and overexploitation of natural resources. As we enter this arena in the marine realm, we must learn from terrestrial experiences and avoid making the same mistakes. Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries is an important first step in that regard.

It is clear from the variety of approaches examined and the discussion of their applicability to undersea cables and Sanctuary resources that this report was well researched and the various options were given thoughtful consideration. The two positive peer reviews concur that this is the case and enhance the report's credibility. We support relying upon a one-time fee for the likely life of the cable (25 years). This approach is beneficial for the telecommunications industry by providing certainty and greater privacy over financial matters. It is consistent with discussions involving representatives from the telecommunications industry and environmental groups in February 2000 in which participants sought to strike a balance between environmental protection and business needs.

However, given the information presented (and the opinion of at least one of the reviewers), the final recommended value of \$120,000 per mile seems low. This value appears to reflect estimates based on several valuation approaches, falling at the high end of the average values surveyed (of \$80,000 to \$120,000 per mile). However, three factors suggest that the \$120,000 figure is low: (1) comments from market observers that the average values are actually below fair market value due to numerous below-value transactions with uninformed sellers, (2) the trend of increasing values over time, with the most recent transactions on the high end of the average range or above it, and (3) a recent transaction for submarine cable rights-of-way not included in the average figures cited above, which is valued at well over \$200,000 per mile (\$280,000 per mile in perpetuity). Since this transaction addressed four rights-of-way for submerged lands (as opposed to overland routes) it is likely to be even more relevant to rights-of-way through National Marine Sanctuaries than other transactions examined. MCBI and AOC urge NOAA to incorporate this highly relevant figure into its analysis and increase its per mile fee accordingly.

Given the rapid upward trend in values for such rights-of-way, frequent updates with a revised fee will be critical to ensure that taxpayers are receiving adequate compensation for allowing commercial ventures highly profitable access to the public's protected resources. Both peer reviews of this report support annual reviews to ensure that values charged are accurate and up-to-date. We strongly urge NOAA to make such periodic updates an integral part of its permitting process.

In summary, we commend NOAA for a thorough examination of this important issue and support the general approach recommended, but urge NOAA to increase its initial estimate of fair market value to reflect a highly relevant recent transaction, and update its estimate of fair market value annually to reflect current market conditions.

Sincerely,

Amy Mathews-Amos  
Vice-President, MCBi

Barbara Jeanne Polo  
Executive Director, AOC

\*\*\*\*\*  
Amy Mathews-Amos, Vice-President  
Marine Conservation Biology Institute  
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Arlington VA 22209  
ph: (703) 465-5959 fax: (703) 465-5960  
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MCBI is a nonprofit tax-exempt organization dedicated to advancing the science of marine conservation biology.  
learn more, please visit our web site at  
<http://www.mcbi.org>

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fair market value.rtf

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Type: Rich Text Format (application/rtf)  
Encoding: base64



Wendy Boudreau  
Senior Attorney

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Basking Ridge, NJ 07920  
908-221-7002  
FAX 908-221-4490

January 11, 2001

**Via Overnight Mail Service and Electronic Mail**

Mr. Matthew Brookhart  
National Office of Marine Sanctuary  
Conservation Policy and Planning Branch  
1305 East-West Highway  
11<sup>th</sup> Floor  
Silver Springs, Maryland 20910

Re: Fair Market Value Analysis for a Fiber Optic Cable Permit in  
National Marine Sanctuaries: Request for Comment Deadline Extension

Mr. Brookhart:

This filing is made on behalf of AT&T Corp. ("AT&T") and Concert Global Networks USA LLC ("Concert"), the global venture jointly owned by AT&T Corp. and British Telecom. AT&T and Concert request an additional 60 days to comment on the recently published notice titled "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries" (66 Fed. Reg. #4, p. 1092, January 5, 2001) and the documents referenced therein. The comment period of less than two weeks is insufficient time to prepare and submit complete comments on this important proposal.

The fair market value of rights-of-way is an issue of great importance to telecommunications service providers, as well as to the American public, as utilizers of these services. The United States Congress recognized the impact of right-of-way fees on the national priority of expanding and enhancing digital opportunity during numerous hearings in 2000.

AT&T and Concert are concerned that the NOAA proposal will have impacts far beyond the boundaries of National Marine Sanctuaries. Although the Fair Market Value Analysis purports to set a license fee per mile of submarine cable crossing a Sanctuary, the "comparables" relied upon are primarily terrestrial, and the rationale for the fee suggests that the same logic and fee would be appropriate for other terrestrial and submarine cable licenses. AT&T and Concert are therefore troubled by the potential consequence that the Fair Market Value Analysis, if adopted by NOAA, could be deemed a legitimate basis for other jurisdictions to set terrestrial and submarine easement or license fees for fiber-optic cables. Other jurisdictions that might thus be influenced by the presumed credibility of a federal agency such as NOAA include (1) other nations and the coastal states of the U.S., in authorizing placement of cables on the seabed in their territorial waters, and (2) other federal and state agencies in authorizing installation of fiber-optic cables on public land.



AT&T and Concert are concerned that such reliance by other jurisdictions on the Fair Market Value Analysis would have a significant adverse impact, because the proposed fee is much larger than other jurisdictions generally have charged. Furthermore, based on our preliminary review to date, AT&T and Concert believe that the analysis should be substantially modified, and that NOAA may well be convinced of that if it can obtain the benefit of more complete public review and input.

Providing less than two weeks to comment on the complex and important issues raised by the analysis and related documents is simply unreasonable. NOAA has apparently spent many months developing this proposal, without any prior opportunity for the public to participate or even obtain any forewarning of the substance. (For example, although AT&T and Concert participated in the workshops NOAA hosted in early 2000 to discuss submarine cable policy, NOAA expressly excluded the subject of license fees from those discussions.)

For all of the foregoing reasons, AT&T and Concert request a 60-day extension to the comment period in order to provide an adequate opportunity to review and comment on this study and its associated peer review documents. The 60 days should run from when the back-up documentation to the two peer review papers was made available to the public, which we understand was not before January 8, 2001.

Please direct any responses or grants of comment deadline extension to [wboudreau@att.com](mailto:wboudreau@att.com) and [pshorb@att.com](mailto:pshorb@att.com). Thank you for your prompt consideration of this request.

Wendy L. Boudreau  
Senior Attorney-AT&T

Paul Shorb  
Senior Attorney-AT&T

**Subject: comment time**

**Date:** Tue, 9 Jan 2001 11:41:03 -0700

**From:** "Andersen, Roy L (Bud)" <banderse@mtpower.com>

**To:** "national oceanographic" <submarine.cables@noaa.gov>

**CC:** "David Sinclair" <dsincla@enron.com>, "cbarn" <carl.barnett@PacifiCorp.com>, "Eric Myers" <EMyers@eei.org>, "Eric Koyanagi" <erick@att.com>

To Whom it may concern:

The Western Utility Group respectfully requests an extension of the comment time on the proposed rental increases as they pertain to the fiber optics industry.

Realizing a review of the proposal and the necessary input from the membership will prevent a careful and studied review we would suggest that an extension of 60-90 days would be very appropriate.

Very Sincerely,

Bud Andersen, Chairman

**Subject: Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries: Request for Comment Deadline Extension**

**Date:** Wed, 10 Jan 2001 14:21:55 -0600

**From:** "Allen, Williford & Seale" <appraise@appraiser.com>

**To:** <submarine.cables@noaa.gov>

Mr. Matthew Brookhart, NOAA

Allen, Williford & Seale (AWS) is an appraisal firm with a nationwide right of way valuation practice. AWS requests an extension of 60 days of the comment deadline for the recently published "Fair Market Value Analysis for a Fiber Optic Cable Permits in National Marine Sanctuaries" and related peer review documents 66 Fed. Reg. #4, p. 1092, January 5, 2001. A two week comment period is insufficient time to prepare and submit complete comments on this important study.

The valuation methodology proposed in this study is not recognized in valuation literature or in case law. Opinions of the appraisal community would be helpful. The methodology used by NOAA will affect all other federal agencies in their acquisition activities. Do all federal agencies really want to use these new proposed valuation approaches for their future acquisitions?

The fair market value of rights-of-way is an issue of great importance to energy and telecommunications service providers, as well as to the American public, as utilizers of these services. The United States Congress recognized the impact of right-of-way fees on the national priority of expanding and enhancing digital opportunity during numerous hearings in 2000. Congress has emphasized the importance of appropriate valuation of rights-of-way for telecommunications facilities on Federal Lands, and in the Interior and Related Agencies Appropriations Act for FY 2001 requested that any policies regarding the collection for rent for such facilities on Forest Service or Bureau of Land Management lands be developed through a formal rulemaking process (See P.L. 106-291 Section 340).

In addition to the direct impact of NOAA's market valuation on the future of fiber optic telecommunications facilities, AWS is concerned that the scope and conclusions of NOAA's Market Value Analysis may have an adverse impact on other related rulemakings. Further, the comment period originally provided was not only inadequate to fully analyze the study and its associated peer review documents, but its brevity was additionally complicated by the intervening year-end holiday season. For all the foregoing reasons, AWS requests a 60-day extension to the comment period, in order to provide an adequate opportunity to review and comment on this study and its associated peer review documents.

Please direct any responses or grants of comment deadline extension to Connie W. Williford, 281/493-4444 or cwilliford@appraiser.com.

Thank you for your prompt consideration of this request.

Connie W. Williford, MAI

**Allen, Williford & Seale**  
**Review and Comments:**

**"Fair Market Value Analysis for a Fiber Optic Cable Permit in  
National Marine Sanctuaries"**

We have reviewed the National Marine Sanctuaries Program's report regarding the "Fair Market Value" analysis for a permit to place a fiber optic cable in marine sanctuaries.

Our background in the appraisal of all types of rights of way, easements, and corridors is extensive. We have been involved in valuing hundreds of right of way projects across the nation over the past thirty (30) years. This experience qualifies us to comment on the above report.

The information, analysis and conclusions presented in this report are flawed in terms of theory. The report raises a number of issues that need to be addressed. Two of the most significant involve a misunderstanding of market value and potential policy contradictions involving sale of assets on one hand and the acquisition of property on the other.

The report talks about four (4) different valuation methodologies. Of the four methods discussed, only one is based on underlying and adjacent land values. The other three are not tied to land value but rather to loss or gain by the individuals or entities as a seller or buyer. The following is a brief discussion of each.

1. Land-based appraisal - The study points out that this traditional methodology includes reliance on the "before and after" scenario, highest and best use and is tied to the underlying land value. At-the-fence (ATF) and corridor valuation are mentioned. This is the loss to seller viewpoint and the study considers value findings via this analysis as very conservative. It is implied that only government uses this methodology while the private sector uses other methods of valuation.
2. Willing buyer willing seller. The study looks at value to the seller and cost to the buyer as points in a negotiation. Each transaction is unique. Presumably, the agreed upon value in this instance is not necessarily based on the underlying land but rather on the positions of the two parties.
3. Income Approach. This technique is based on some allocation of the overall enterprise to the right of way and payment of rent or participation in proceeds to the right of way owner. Alternatively, these streams of income could be discontinued to a lump sum figure. The study suggests that it would be difficult to accomplish bookkeeping and account for all of the revenue. I agree. This value is not tied to the underlying fee land value.

4. Comparable Transactions. The report uses direct comparison of various easement, right of way and corridor transactions in order to arrive at a value for the subject right of way. No explanation of the basis for comparison is developed. The use of corridor sales should be used only when the subject property is a corridor. In this instance, it is not. Further, the corridor approach should be used as a land-based appraisal. This methodology is not based on the underlying fee of the encumbered property.

In the final analysis, the conclusion of value in the report is based on a combination of the income approach and comparable transactions. Neither of which is related to the underlying fee or at the fence value.

If value (compensation) is not tied to the underlying land or the adjacent land, what is it based upon? According to the report, apparently it is based on gain to the buyer. One buyer's gain is unique to that buyer. How can a transaction involving one buyer, representing that buyer's particular gain, be compared to another situation involving another buyer with their particular scenario of potential gain? It is improper to attribute damage or gain resulting from a transaction to an entity or individual rather than to the property involved in that transaction. This results in an indication of value other than market value.

Market value is related to real property and to an individual or entity whether buyer or seller and requires a land based appraisal methodology. A value estimate based on something other than the adjacent or underlying land represents a value other than market value. The value described in the report is very similar to public interest value. Public interest value has been discussed extensively in appraisal literature and determined not to be market value by the Appraisal Institute.

The report also introduces inconsistency in policy decisions. The report suggests that appraisal methodology used for government transaction (loss to the seller) should be different than the methodology used in the private sector (gain to the buyer). This raises the question of whether a government agency may use one set of rules when they sell property and another when they acquire. The question then arises as to how property owners, juries and courts will react to the charge that the agency wants to buy cheap but sell high.

Hopefully, the conclusion of this report will not be implemented.

**Subject: Fair Market Value Analysis**

**Date:** Thu, 18 Jan 2001 15:51:54 -0500

**From:** <Eric\_Chiapponi@fws.gov>

**To:** [submarine.cables@noaa.gov](mailto:submarine.cables@noaa.gov)

**CC:** [Jeffery\\_Donahoe@fws.gov](mailto:Jeffery_Donahoe@fws.gov), [A\\_Alvarez@fws.gov](mailto:A_Alvarez@fws.gov), [Richard\\_H\\_Johnson@fws.gov](mailto:Richard_H_Johnson@fws.gov)

In reference to the subject ["Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries"], which was published on page 1092 of the January 5, 2001 Federal Register, I think you should consider an extension of the comment period beyond the January 18, 2001 deadline.

Eric Chiapponi  
Chief Appraiser  
U.S. Fish and Wildlife Service

**Subject: Request for Comment Deadline Extension**

**Date:** Wed, 10 Jan 2001 15:52:38 -0600

**From:** "Wallace, Christy J." <christy.wallace@wilcom.com>

**To:** "submarine.cables@noaa.gov" <submarine.cables@noaa.gov>

**CC:** "Harwell, Bill" <bill.harwell@wilcom.com>,  
"Schmelzer, George" <george.schmelzer@wilcom.com>,  
"Emling, Gretchen" <Gretchen.Emling@williams.com>,  
"Lea, Wendy" <wendy.lea@wilcom.com>

To: Mr. Matthew Brookhart, NOAA

From: Christy Wallace, Williams Communications, LLC

RE: Fair Market Value Analysis for a Fiber Optic Cable Permit in the  
National Marine Sanctuaries: Request for Comment Deadline Extension

On behalf of Williams Communications, LLC, I request an extension of 60 days of the comment deadline for the recently published "Fair Market Value Analysis for a Fiber Optic Cable Permit in the National Marine Sanctuaries" and related peer review comments 66 Federal Register 54, p. 1092, January 5, 2001. A two-week comment period is insufficient time to prepare and submit complete comments on this important study.

Williams Communications is based in Tulsa, Oklahoma and is North America's only exclusively carrier-focused fiber-optic network and the largest independent source of end-to-end integrated business communications solutions - data, voice or video. In addition to backbone capacity, Williams provides services to more than 100 countries worldwide. Williams Communications offers direct connections to Europe and Asia via Williams' access to 62,000 miles of Pacific and Atlantic undersea cables.

The fair market value of rights of way is an issue of great importance and Williams would like to have sufficient time to review and comment.

Please direct any responses or grants of comment deadline extension to my attention:

Thank you for your consideration,

Christy J. Wallace  
Right of Way Acquisition  
918-573-4407 office  
918-625-9588 cell  
christy.wallace@wilcom.com

**Subject: Fiber Optic telecom R/W crossings national marine sanctuaries**

**Date:** Wed, 17 Jan 2001 16:24:34 -0500

**From:** <giulis@NU.COM>

**To:** [Submarine.cables@noaa.gov](mailto:Submarine.cables@noaa.gov)

**CC:** [Emyers@eei.org](mailto:Emyers@eei.org), [zaklurc@NU.COM](mailto:zaklurc@NU.COM), [debrir@NU.COM](mailto:debrir@NU.COM)

Northeast Utilities is currently reviewing the Office of National Marine Sanctuaries (NOMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA) and Department of Commerce (DOC) study of Fair Market Value charges for fiber optic telecommunication rights-of-way crossing national marine sanctuaries.

In order to have sufficient time to study this matter, we hereby request a 60 day extension to set forth the appropriate comments.

Your consideration is appreciated.

Salvatore Giuliano  
Manager, Real Estate & Land Planning  
Northeast Utilities  
P O Box 270  
Hartford Connecticut, 06141-0270  
Tel: 860 665-6173  
Fax: 860 665-6933  
E-Mail: [giulis@nu.com](mailto:giulis@nu.com)



**Subject: Fwd:Fair Market Value Analysis..Nat.Marine Sanctuaries****Date:** Thu, 11 Jan 2001 12:49:59 -0500**From:** "Rick Etter" <Rick.Etter@faa.gov>**To:** <submarine.cables@noaa.gov>

Mr. Matthew Brookhart, NOAA

I am the Airports Acquisition Specialist for the Federal Aviation Administration Office of Airports. The FAA has extensive interests in the acquisition of property for airport programs that relies on the fair market value standard. I have briefly read the subject reports (i.e. "Fair Market Value Analysis for a Fiber Optic Cable Permits in National Marine Sanctuaries" and related peer review documents 66 Fed. Reg. #4, p. 1092, January 5, 2001), which I believe may not adequately limit or properly define the proposed methodology for assessing "fair market value" to establish the Marine Sanctuary permit fee. There are, as noted in the report, numerous methodologies that may be applied in determining compensation or a "market price", although some of methodologies described in the report are not acceptable or creditable as a valuation of the "fair market value" of real property. Clearly, negotiations on a permit fee price are the business of the negotiating parties and I would not imply that these price negotiations would have any affect on FAA airport land acquisition programs. However, it is my impression that the report may be misunderstood and sought to be applied more broadly as defining a "fair market value" valuation standard for other public programs. Uniform and acceptable real property appraisal standards exist to determine fair market value for public land acquisition which, without some clarification in the subject report, may be in opposition to the report conclusions.

Therefore I am requesting an extension of 60 days of the comment deadline for the recently published report. This will allow time for adequate consideration of any potential impacts and as warranted comment on potential conflicts and seek clarifications and distinctions with the fair market value methodologies applied for FAA airport programs.

Thank you for your consideration.

Rick Etter  
Airport Acquisitions Specialist  
Federal Aviation Administration  
Office of the Associate Administrator for Airports  
Community and Environmental Needs Division (APP-600)  
(202) 267-8773

**Subject: Request for 60 day extension of comment period**

**Date:** Wed, 10 Jan 2001 16:37:19 -0500

**From:** "J Mike JONES" <J.Mike.JONES@igate.fhwa.dot.gov>

**To:** <submarine.cables@noaa.gov>

**CC:** "Reginald BESSMER" <RBESSMER.FHEP.FHQMS07@igate.fhwa.dot.gov>,  
<Barnie.L.McDonald@mvd02.usace.army.mil>

To: submarine.cables@noaa.gov

Subject: Fair Market Value Analysis for a Fiber Optic Cable Permit in  
National Marine Sanctuaries: Request for Comment Deadline Extension

Attn: Mr. Matthew Brookhart, NOAA

Mr. Brookhart,

I am a Realty Specialist in the national headquarters office of the Federal Highway Administration, Office of Real Estate Services (ORES) in Washington, DC. Along with our Chief Appraiser, Mr. Reginald Bessmer, our technical areas of expertise are real property appraisal and appraisal review.

Mr. Bessmer represents FHWA on the Appraisal Foundation Advisory Council. I serve as the International Right of Way Association's representative to the Appraisal Foundation Advisory Council.

Our Office just became aware of the Fair Market Analysis Report referenced above. I strongly urge you to establish an extension of 60 days of the comment deadline for the recently published "Fair Market Value Analysis for a Fiber Optic Cable Permits in National Marine Sanctuaries" and related peer review documents 66 Fed. Reg. #4, p. 1092, January 5, 2001.

A two week comment period is insufficient time to prepare and submit complete comments on such an important issue.

I've only had a chance to scan the report this afternoon, but the methodology proposed in this study does not appear to be consistent with those recognized in valuation literature or in case law. I believe your analysis could benefit significantly from input from the appraisal community at large, and from the appraisal staff of the various Federal agencies.

Please feel free to contact either Reg Bessmer (202) 366-2037 or myself, Mike Jones (202) 366-2026 with regard to this issue.

Thank you.

**Subject: Request for extension to comment deadline**

**Date:** Wed, 10 Jan 2001 09:31:01 -0800

**From:** <Scott\_Bolton@enron.net>

**To:** submarine.cables@noaa.gov

To: Mr. Matthew Brookhart, NOAA c/o submarine.cables@noaa.gov

From: Scott Bolton, Enron Corp.

Re: Fair Market Value Analysis for a Fiber Optic Cable Permit in  
National Marine Sanctuaries: Request for Comment Deadline Extension

On behalf of Enron Corp. and Enron Broadband Services, Inc., I request an extension of at least 60 days of the comment deadline for the recently published "Fair Market Value Analysis for a Fiber Optic Cable Permits in National Marine Sanctuaries" and related peer review documents (66 Fed. Reg. #4, p. 1092, January 5, 2001). A two week comment period is insufficient time to prepare and submit complete comments on this important study.

Enron Broadband Services (EBS), a wholly-owned subsidiary of Enron Corp., owns and maintains almost 18,000 miles of fiber optic network in the US and Canada. In addition, EBS also leases telecommunications capacity on undersea fiber optic routes. Because of our interest in communications facilities and the regulatory treatment and compensation for the use of public rights-of-way, Enron is an interested stakeholder in this issue. The recommendations by NOAA on the valuation of use of undersea rights-of-way and policies on new permitting will have broad implications on other use of public lands rights-of-way.

Enron looks forward to further consideration of the details and implications of the NOAA study and respectfully requests additional time for public comment. Thank you for your consideration.

Scott D. Bolton  
Director, Government Affairs - The Americas  
c/o Enron Broadband Services  
2100 SW River Parkway, Suite 700  
Portland, OR 97201  
(503) 886-0360 direct  
(503) 886-0438 fax  
scott\_bolton@enron.net

**Subject: Comments on Fair Market Value Analysis: Request for extension of comment period.**

**Date:** Wed, 10 Jan 2001 10:24:58 -0500

**From:** "Eric Myers" <EMyers@eei.org>

**To:** <submarine.cables@noaa.gov>

To: Mr. Matthew Brookhart, NOAA c/o submarine.cables@noaa.gov

From: Eric Myers, Edison Electric Institute

Re: Fair Market Value Analysis for a Fiber Optic Cable Permit in  
National Marine Sanctuaries: Request for Comment Deadline Extension

On behalf of the Edison Electric Institute (EEI), I request an extension of 60 days of the comment deadline for the recently published "Fair Market Value Analysis for a Fiber Optic Cable Permits in National Marine Sanctuaries" and related peer review documents 66 Fed. Reg. #4, p. 1092, January 5, 2001). A two week comment period is insufficient time to prepare and submit complete comments on this important study.

The Edison Electric Institute (EEI) is the association of shareholder-owned electric utilities, industry associates, and international affiliates. Our utility members distribute electricity to over 70% of all energy consumers in the United States, and generate over 75% of all electricity used in this country. The generation, transmission, and distribution of electricity requires various land uses, including over 670,000 miles of transmission line rights-of-way (ROW) nationwide, some of which cross federal lands. EEI's Members also operate and maintain a significant and growing fiber optic telecommunications network. EEI works closely with companies and associations in other industries to address issues of common concern relating to fiber optic networks on federal lands.

The fair market value of rights-of-way is an issue of great importance to energy and telecommunications service providers, as well as to the American public, as utilizers of these services. The United States Congress recognized the impact of right-of-way fees on the national priority of expanding and enhancing digital opportunity during numerous hearings in 2000. Congress has emphasized the importance of appropriate valuation of rights-of-way for telecommunications facilities on Federal Lands, and in the Interior and Related Agencies Appropriations Act for FY 2001 requested that any policies regarding the collection for rent for such facilities on Forest Service or Bureau of Land Management lands be developed through a formal rulemaking process [See P.L. 106-291 Section 340]. In addition to the direct impact of NOAA's market valuation on the future of fiber optic telecommunications facilities, EEI is concerned that the scope and conclusions of NOAA's Market Value Analysis may have an adverse impact on other related rulemakings. Further, the comment period originally provided was not only inadequate to fully analyze the study and its associated peer review documents, but its brevity was additionally complicated by the intervening year-end holiday season. For all of the foregoing reasons, EEI requests a 60-day extension to the comment period, in order to provide an adequate opportunity to review and comment on this study and its associated peer review documents.

Please direct any responses or grants of comment deadline extension to Eric Myers, Environmental Policy Analyst, Edison Electric Institute [202-508-5508, EMyers@eei.org ]

Thank you for your prompt consideration of this request,

-Eric Myers  
Environmental Policy Analyst

\*\*\*\*\*  
Eric Myers  
Environmental Affairs Analyst  
Edison Electric Institute  
701 Pennsylvania Avenue NW

Wednesday, June 13, 2001

Comments on Fair Market Value Analysis:  
Request for extension of comment period.

Page: 2

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\*\*\*\*\*

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**received**  
3/26/01

**Sanctuary Advisory Council**  
**Monterey Bay National Marine Sanctuary**  
299 Foam Street  
Monterey, CA 93940  
(831) 647-4201

March 23, 2001

**Voting Members**

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Recreation  
Secretary

Brian Baird  
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Tami Grove  
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Cordell Bank NMS

Mr. Dan Basta  
Director  
Office of National Marine Sanctuaries  
National Oceanic and Atmospheric Administration  
1305 East-West Highway  
Silver Spring, MD 20910

RE: Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries

Dear Mr. Basta:

Thank you for giving the Monterey Bay National Marine Sanctuary Advisory Council an opportunity to review and comment on the Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries report.

The Monterey Bay National Marine Sanctuary Advisory Council serves as an advisory body to the National Oceanic and Atmospheric Administration on matters pertaining to the Monterey Bay National Marine Sanctuary. The Advisory Council assists the national marine sanctuary program by representing the interests of the public at large, agriculture, the Association of Monterey Bay Governments, business and industry, the California Coastal Commission, the California Environmental Protection Agency, the California Resources Agency, conservation, diving, education, enforcement, fishing, ports and harbors, recreation, research, tourism, and the U.S. Coast Guard.

The Advisory Council believes that the conclusions of the Fair Market Value Analysis report are premature, lack special consideration for the unique and protected status of sanctuaries, and are based on too narrow a sample of case studies by relying on a survey of easements. The Advisory Council would like to see another analysis that takes these factors into consideration.

In particular, the Advisory Council urges NOAA to consider the following factors in assessing the fair market value of the fiber optic cable easement:

- Consideration of additional data in determining "fair market value", including:
- Data for submerged cables off of Morro Bay (State Lands Commission data should at least be included as one data point).

The Sanctuary Advisory Council is composed of 19 federally appointed representatives from government agencies, local institutions, and user groups concerned with the resources of the Monterey Bay National Marine Sanctuary. The Council advises the Sanctuary Superintendent on matters of policy and provides a link between the community and Sanctuary management.



- Data regarding pipeline easement off of Morro Bay.
- Factoring in any other studies available regarding submarine cable easements, pipeline easements, and rights-of-way.
- The Fair Market Value Analysis report should expressly address a policy of discouraging cables within national marine sanctuaries. Practically, this means adding a "premium" to any fee structure to reflect:
  - The unique and protected status of sanctuaries;
  - The potential harm cables may cause to sanctuary resources;
- The inconsistency between cable activities and sanctuary regulations (see below).

The Department of Commerce has acknowledged that fiber optic cable projects conflict with sanctuary regulations. As stated in a recent Federal Register Notice:

*[N] ational marine sanctuaries have been established as special places set aside as protected areas of national significance. As such, they are afforded a higher level of protection. Within each sanctuary, certain types of activities, including activities inherent to cable laying, operating, repairing, and removing submarine cables have been determined to be generally incompatible with the statutory objective of resources protection and are therefore prohibited by regulation.<sup>1</sup>*

- Reconsideration of various mechanisms for assessing and collecting fees. For example, an annual fee, or a limited term with renegotiations, might be preferable to a fee schedule tied to the lifetime of the permit. This is particularly relevant as fees for cable easements are increasing dramatically over relatively short periods of time. As noted in the Fair Market Value Analysis report itself, National Park Service data for cable easements demonstrated a 50% increase in price levels between 1987 and 1993, followed by a more than 800% increase in price levels between 1993 and 1997.<sup>2</sup>

The Advisory Council recommends that NOAA revise its fair market valuation of a fiber optic cable permit to take these factors into account. Further, because the permit review process is likely to take some time, during which market conditions may change dramatically, the Advisory Council recommends that the final determination of fair market valuation be made closer to the date of issuance of an actual permit, should such a permit be issued.

<sup>1</sup> 65 Fed. Reg 51267 (8/23/00).

<sup>2</sup> Fair Market Value Report, page 13

Thank you again giving the Monterey Bay National Marine Sanctuary Advisory Council an opportunity to review and comment on the Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries report. We look forward to reviewing more information on the subject.

Sincerely,

*Stephanie Harlan*

Stephanie Harlan, Chair

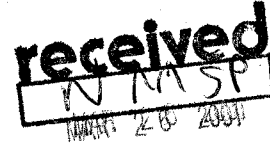


**CENTER FOR MARINE CONSERVATION - SAVE OUR SHORES  
ENVIRONMENTAL DEFENSE CENTER**

**DELIVERED BY EMAIL TO:**

**submarine.cables@noaa.gov  
(Original to Follow by Mail)**

March 21, 2001



Matt Brookhart  
National Marine Sanctuary Program, NOAA  
N/ORM6, 11<sup>th</sup> Floor  
1305 East-West Highway  
Silver Spring, MD 20910

**RE FAIR MARKET VALUE ANALYSIS FOR A FIBER OPTIC CABLE PERMIT IN  
NATIONAL MARINE SANCTUARIES**

Dear Mr. Brookhart:

Please accept the following comments on behalf of the Center for Marine Conservation (CMC), the Environmental Defense Center (EDC), and Save Our Shores (SOS) regarding the National Oceanic and Atmospheric Administration's (NOAA) December 2000 Report Entitled "Fair Market Value Analysis for a Fiber Optic Cable Permits in National Marine Sanctuaries" (hereinafter "the Fair Market Value Report").

As the Department of Commerce itself notes, many of the activities inherent to submarine cable installation, operation, repair, and removal are generally incompatible with the National Marine Sanctuary Program's statutory objective of resource protection.<sup>1</sup> Accordingly, our organizations oppose laying of fiber optic cables in national marine sanctuaries. However, recognizing that NOAA has already permitted three fiber optic cables to be installed in two sanctuaries and is considering additional proposals, we offer the following comments regarding the Fair Market Value Report.

**Sanctuary Program's Resource Protection Mandate**

The National Marine Sanctuary Program was created to safeguard our nation's most unique and valuable ocean areas. The thirteen national marine sanctuaries contain cultural, historical, recreational, ecological, research, educational, and aesthetic qualities that qualify them as "areas of the marine environment which are of special national significance."<sup>2</sup> To protect the richness and diversity of marine habitats contained in the sanctuaries, the primary objective of the Sanctuary Program is resource protection. Accordingly, Congress has enacted strict protections for sanctuaries' waters and set a very high threshold for activities that might threaten

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<sup>1</sup> 65 Fed. Reg. 51267 (8/23/00).

<sup>2</sup> 15 C.F.R. Sect. 922.1 (b)(1).

their resources. Under existing sanctuary regulations, many historic activities are grandfathered in, but new commercial development is generally prohibited.

The regulations and designation documents for most of the national marine sanctuaries specifically prohibit alteration of the seabed of the sanctuary, and constructing, placing or abandoning any structure, material or other matter on the seabed of the sanctuary. As noted in the Federal Register notice for the Monterey Bay National Marine Sanctuary designation:

The intent of this prohibition is the protection the resources and qualities of the Sanctuary from the harmful effects of ... commercial development, which may disrupt and/or destroy sensitive marine benthic habitats, such as kelp beds, invertebrate populations, fish habitats, and estuaries and sloughs.<sup>3</sup>

The only exception to this prohibition is for activities with impacts that are both negligible and short-term and which will further sanctuary goals such as providing a benefit to research, education, natural, or historical values. This exception clearly does not apply to purely commercial activities such as an installation of fiber optic cables for commercial use.

The Department of Commerce has acknowledged that fiber optic cable projects conflict with sanctuary regulations. As noted in a recent Federal Register Notice:

[N]ational marine sanctuaries have been established as special places set aside as protected areas of national significance. As such, they are afforded a higher level of protection. Within each sanctuary, certain types of activities, including activities inherent to cable laying, operating, repairing, and removing submarine cables have been determined to be generally incompatible with the statutory objective of resources protection and are therefore prohibited by regulation.<sup>4</sup>

Because submarine cable projects are presumptively disallowed under existing sanctuary resource protection regulations, and because such activities will have a potentially significant negative impact on the marine environment, cable companies should be directed by NOAA to seek project routes that do not transit marine sanctuaries.

### **Potential Environmental Impacts of Undersea Cables.**

The Fair Market Value Report underestimates the potential environmental impacts of undersea cable projects, dismissing them as "relatively limited". The Report also cites the existence of "a variety of telecommunications cables" as providing a "reasonably extensive record" for examining potential effects. However, possible effects of such cables, such as changes in behavior or distribution of some species, would be very difficult to detect without extensive

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<sup>3</sup> 57 Fed. Reg. 43320-2 (9/18/92).

<sup>4</sup> 65 Fed. Reg. 51267 (8/23/00).

monitoring. Historically, submarine cables have not been subject to significant monitoring efforts.

Our organizations recommend revision of the report to acknowledge the full range of environmental impacts that can occur during the lifetime of a submarine cable project, including impacts associated with installation, repair, and eventual removal. Further, the report should acknowledge that evaluating the long-term impacts of submarine cables is difficult, time-consuming, and expensive.

Installation of a submarine fiber optic cable requires a miles-long underwater construction project involving large-scale machinery. Not surprisingly, there are a variety of environmental impacts associated with these activities. The depth of cable burial can significantly affect the severity of adverse impacts associated with cable installation. As noted by peer reviewer KMI Corporation, "Cable is buried one *to two* meters deep in the ocean floor" (emphasis in original).<sup>5</sup> According to the California State Lands Commission, cables buried deeper than one meter require physical removal of material because bottom sediments tend to slump back into the cable trench. "This process leaves a substantial scar on the bottom and causes considerable disruption (sic) the benthic communities."<sup>6</sup>

In the nearshore environment, cables are buried in trenches in the seabed dug by massive sea plows. The sea plow creates an up to twenty-foot wide zone of disturbance that may extend 60-70 miles offshore. The process of trench digging and cable burying disrupts the seabed, crushing bottom-dwelling creatures immediately adjacent to the trench and disturbing sediment that smothers marine life in the surrounding area. Again according to the California State Lands Commission, in waters deeper than 1200 meters, the amount of sediment required to be removed for burial at a depth of 1.5 meters is "clearly an enormous volume of material and major disturbance of the seafloor, this material will blanket the seafloor for a distance of several meters from the cable route...with a layer of sediment several inches thick, covering and suffocating the benthic communities in this area."<sup>7</sup>

In areas of rocky bottom habitat, submarine canyons, and in deep water, cables are laid directly on the sea floor where they are subject to strumming and pose ongoing risks to marine mammals. There are documented historical cases of sperm whales becoming fatally entangled in submarine cables, and an injured gray whale calf was encountered in January 2001 along a fiber optic cable in California, raising concerns that its injuries may have been cable related.

As noted by peer reviewer KMI Corporation, environmental impacts associated with submarine cables are not limited to installation and removal phases.<sup>8</sup> Both buried and surface laid cables can be damaged, requiring repair activities (including dragging a large grapnel hook across the seabed), and reburial. Cable removal causes additional disturbance to the seabed, dislodging

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<sup>5</sup> KMI Corporation, "Review and Comments: "Fair Market Value Analysis for a Fiber optic Cable Permit in National Marine Sanctuaries" at 6.

<sup>6</sup> California State Lands Commission, Staff Report on MFS Globe Net Fiber Optic Cable Project, Exhibit B at 6 (2/8/00).

<sup>7</sup> *Id.*

<sup>8</sup> KMI at 6.

organisms that may have colonized areas above the cable. However, leaving cables in place also raises significant environmental concerns.

Finally, recent experience in the U.S. Virgin Islands, Florida, Maine, Washington, and California, demonstrate that unforeseen construction problems frequently occur during cable installation. Such problems include: spills and leaks of drilling fluids, difficulty in achieving cable burial targets, unexpected looping of cable, etc.<sup>9</sup> It is our organizations' understanding that the cable project within Olympic Coast National Marine Sanctuary, predicted for near 100% burial along the cable's thirty mile length, has nearly seven miles of exposed cable, presenting risks of strumming and marine mammal entanglement. The Fair Market Value Report should acknowledge that the reality of cable project impacts typically differs significantly from what is predicted in permit applications for these projects.

The Fair Market Value Report should be revised to include a more comprehensive discussion of potential environmental impacts to sanctuary resources. Any proposed fee structure for cable projects within sanctuaries should take into account potential damage to sanctuary resources over the project lifetime including installation, repairs, and removal.

### **Resource Protection Mandate and Fair Market Value**

Any effort to price cable easements under a "fair market value analysis" must take into account the unique protected status of national marine sanctuaries and the importance of the resources they contain. Any fee structure developed by NOAA should incorporate the policy directive of discouraging sanctuary routes; thus fees for cables in sanctuaries should be set relatively high, compared to non-sanctuary routes, to send a price signal that such routes are not preferable.

In his review of the Fair Market Value Report, Richard Schmalensee, Dean of the Massachusetts Institute of Technology (MIT) Sloan School of Business, notes the risk of setting the price for easements in sanctuaries too low: "if the costs of projects that do involve sanctuaries are based on permit prices on average below WBWS [willing buyer-willing seller] prices, investors lucky enough to get permits will build too many projects in national marine sanctuaries and realize windfall prices."<sup>10</sup> Thus, any fee structure that does not directly take into account the uniquely high value of sanctuary resources and the policy of discouraging routes through sanctuaries, will be both economically inefficient and environmentally harmful.

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<sup>9</sup> See Government of the Virgin Island of the United States, Department of Planning and Natural resource, Notice of Violation: Order for Remedial Action and Notice of Opportunity for Hearing (Dec. 30, 1998) (regarding bentonite contamination of coral reef); State of Maine, Department of Environmental Protection, Administrative Consent Agreement in the Matter of AT&T Communications of New England, Inc. et al. (July 22, 1997) (regulatory action against common carrier for habitat destruction including damage to coastal wetlands); & Jones, Will, "More Bentonite Mud Found at Butler Bay", St. Croix Avis (May 16, 2000 at 4).

<sup>10</sup> Schmalensee, Richard, "Review of the September 2000 draft of "Fair Market Value Analysis for a Fiber Optic Cable permit in National Marine Sanctuaries," November 2000, at 1

### **Value of National Marine Sanctuaries as Protected Areas**

The sanctuary program is designed to create a unique network of marine protected areas with exceptional natural resource value. There are only thirteen marine sanctuaries in existence throughout the United States. The Sanctuary Program has strong public support because Americans value environmental protection and believe that certain areas should be protected from commercial development and left relatively pristine.

The non-market "amenity" values associated with national marine sanctuaries do not lend themselves easily to traditional economic valuation methods. Schmalensee notes in his peer review that regardless of the actual damage to sanctuary resources caused by installation of a fiber optic cable, there are "substantial non-market amenity costs associated with just knowing that a portion of a sanctuary is no longer pristine."<sup>11</sup> The fair market value of cable easements through national marine sanctuaries should be set at a premium to reflect the harm caused by allowing a commercial development to affect the non-market amenity values associated with a sanctuary.

### **Willing Buyer and Seller Scenario**

The Fair Market Value Report should be revised to include more information regarding the Willing Buyer and Seller Scenario (WBWS). The Report dismisses the WBWS scenario stating that gathering the necessary information to use this scenario as the basis for easement pricing would be too costly to research and would contain inherent uncertainties. OUR ORGANIZATIONS urges NOAA to revise the Report to at least include estimates for "build-around" cost, that is the cost of acquiring (or building) an alternative out-of-sanctuary route.

NOAA's Proposed Principles for Laying Submarine Cables in the Marine and Coastal Environment, include a requirement that there be "no feasible alternate to transiting the Sanctuary" before an in-sanctuary cable route will even be considered.<sup>12</sup> A determination of the feasibility of an out-of-sanctuary route will necessarily require some showing of the costs associated with such a route. Thus, information should be available regarding the "build-around cost" for any sanctuary cable route. This information would be very relevant to determining the value of a sanctuary route to the buyer and should be considered in setting cable easement fees.

### **Historical Transactions as Basis of Fee Level**

The Fair Market Value Report's recommendation of an easement fee of \$120,000 per mile is not supported by the evidence and significantly undervalues cable easements in national marine sanctuaries. According to the Fair Market Value Report, the \$120,000 figure represents "the average current trend price based on the analysis of recent comparable transactions."<sup>13</sup> However, the Report itself acknowledges, "[m]any market observers note that average values are fair below

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<sup>11</sup> Schmalensee at 3

<sup>12</sup> 65 Fed. Register 51270 (August 23, 2000).

<sup>13</sup> Fair Market Value Report at 21.

fair market value due to numerous below-value transactions with uninformed sellers.”<sup>14</sup> According to peer reviewer Schmalensee: “\$120,000 per mile for a perpetual lease, the draft report’s recommendation, is more likely to be below than above average WBWS for a fiber optic cable permit in a national marine sanctuary” (emphasis in original).<sup>15</sup> Finally, the Report acknowledges that: “a value of \$280,000 per mile may be typical in the future for installations on submerged lands.”

The historical transactions relied upon to justify the recommendation of a \$120,000 per mile fee are easements located under or adjacent to highways, turnpikes, and abandoned railroad lines, all heavily impacted transportation corridors that do not imply any sort of conservation obligation. There is a fundamental difference in value between granting a cable easement along a highway and allowing commercial development of the seabed in a marine protected area. Again, the fair market analysis should explicitly address the unique protected status of national marine sanctuaries and the natural resources they are designed to protect.

The Fair Market Value Report’s exclusion of data points for easement fees from February 2000, associated with four permit transactions for rights-of-way associated with submerged cables off of the California coast is arbitrary and capricious. The Report attempts to justify excluding this data, “for the sake of keeping overland rights of way separate from undersea routes”. Since NOAA’s policy will only affect undersea routes, exclusion of submarine easement data in favor of terrestrial project data cannot be justified. If the agency does not want to combine data from submarine and land transactions, the land transactions should be excluded and the submerged data retained and used as the basis of a NOAA fee structure.

Our organizations recommend that the recent California State Lands Commission transactions regarding cable easements for submerged lands (approximately \$280,000 per mile) should be the starting point for assessing appropriate fee structures for undersea cables. At the very least, these data points should be included in fee structure based on averaging historical transactions.

Easement fees for undersea cables within national marine sanctuaries should be significantly higher than out-of-sanctuary fees to reflect: (1) the intrinsic value of sanctuary resources; (2) the protected status of these resources and the costs to monitor, maintain and restore them; and (3) the policy of discouraging cables within sanctuaries.

### **Need for Shorter Term Permits with Periodic Review and Revision of Fee Structure**

Our organizations are concerned that the recommended fee level (\$120,000 per mile) relies too heavily on data points that are from eighteen months to over six years old and may already be significantly out of date. The Fair Market Report notes: “a rapidly increasing price trend is evident” and cites National Park Service data demonstrating a 50% increase in price levels

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<sup>14</sup> *Id.*

<sup>15</sup> Schmalensee at 4.

between 1987 and 1993, followed by a more than 800% increase in price levels between 1993 and 1997.<sup>16</sup>

Our organizations share the concerns of both peer reviewers regarding potentially rapid changes in permit price data and the need for a flexible pricing policy that is subject to frequent review and revision. According to KMI Corporation: "it might be appropriate for the fee to be revised on an annual basis due to rapid changes in the fiber-optics industry."<sup>17</sup> Similarly, Richard Schmalensee notes:

Market prices for fiber optic rights-of-way have risen dramatically in recent years. Today's correct prices, if frozen, will certainly be wrong tomorrow. Thus, *it is vital that whatever rule or regulation sets a per-mile price (or prices) for fiber optic cable permits in national marine sanctuaries also provide for frequent (perhaps annual) and relatively automatic updating of that price (or those prices).* (Emphasis in original).<sup>18</sup>

Our organizations recommend that NOAA adopt policies to ensure that cable fees keep up with inflationary pressure and future increases in easement value. There are at least two methods NOAA could use to ensure that cable fees keep up with future increases in easement value. First, NOAA could set fees well above the value of average historical transactions to ensure that fees keep up with inflationary pressure and future value increases. Alternately, NOAA could grant shorter term permits subject to periodic review and revision. This would allow a reconsideration of fee levels to ensure that easement fees keep up with changing market values.

#### **Fees Collected Should be Applied in Sanctuary Affected**

Finally, our organizations recommend that any easement fees collected by NOAA for submarine cable routes through national marine sanctuaries be used in the specific sanctuary affected by the cable route. Cable fees should be earmarked for mitigation, restoration, protection and enhancement of resources in the sanctuary affected by the cable.

#### **Conclusion**

Because many of the activities inherent to submarine cable installation, operation, repair, and removal are generally incompatible with the National Marine Sanctuary Program's statutory objective of resources protection, our organizations oppose installation of additional cables within sanctuaries. If additional cables are considered, cable companies should be required to pay the fair market value of easements through sanctuary waters. Fair market value should be calculated from a base price of \$280,000 per mile (a figure generated from the most timely and

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<sup>16</sup> Fair Market Value Report at 13.

<sup>17</sup> KMI Corporation at 6.

<sup>18</sup> Schmalensee at 2.

relevant historical easement transactions), with a premium added to reflect the unique, protected status of sanctuaries and the policy of discouraging cables in sanctuaries.

Thank you for your consideration of these comments.

Sincerely,

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